

STATEMENT OF EMERGENCY

803 KAR 2:330E

This emergency administrative regulation is promulgated to meet an imminent threat to public health, safety, or welfare, to prevent a loss of federal funds, and ensure compliance with federal mandates. Kentucky operates a State Plan approved by the Occupational Safety and Health Administration (OSHA) that provides employee occupational safety and health (OSH) protections. OSHA approves, monitors, and provides funding to Kentucky. On June 21, 2021, the Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (ETS) to protect healthcare and healthcare support service workers from occupational exposure to coronavirus disease 2019 (COVID-19) in settings where people with COVID-19 are reasonably expected to be present. OSHA determined that employee exposure to severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) presents a grave danger to workers in all healthcare settings where people with COVID-19 are reasonably expected to be present. OSHA also determined that an ETS is necessary to protect healthcare and healthcare support employees in covered healthcare settings from exposures to SARS-CoV-2. During the period of the ETS, covered healthcare employers must develop and implement a COVID-19 plan to identify and control COVID-19 hazards in the workplace. Covered employers must also implement other requirements established in the ETS to reduce transmission of COVID-19 in their workplaces. It is necessary to promulgate this emergency regulation to meet the requirements established in Public Law 91-596 84 STAT. 1590, 29 C.F.R. 1902.3(c)(1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.7(a), 29 C.F.R. 1904.37(a), 29 C.F.R. 1904.37(b)(1), 29 C.F.R. 1904.37(b)(2), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(b), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(i), which all require the Kentucky OSH Program to be as effective as OSHA. This emergency administrative regulation ensures Kentucky's compliance with the federal mandates, maintains Kentucky's primacy, and retains federal funding. Kentucky must adopt OSHA's ETS within thirty (30) days of the June 21, 2021 final rule and it must remain in effect for the duration of OSHA's ETS. This emergency administrative regulation will be not replaced by an ordinary administrative regulation since OSHA has not promulgated a permanent final rule.

ANDY BESHEAR, Governor
JAMIE LINK, Secretary

LABOR CABINET

Department of Workplace Standards

Division of Occupational Safety and Health Compliance

Division of Occupational Safety and Health Education and Training

(New Emergency Administrative Regulation)

803 KAR 2:330E. Occupational Exposure to COVID-19.

EFFECTIVE: July 20, 2021

RELATES TO: KRS 338.015, 29 C.F.R. 1910.502-509

STATUTORY AUTHORITY: KRS 338.051, 338.061

NECESSITY, FUNCTION, AND CONFORMITY: KRS 338.051(3) requires the Kentucky Occupational Safety and Health Standards Board to promulgate occupational safety and health administrative regulations and authorizes the chairman to adopt federal standards without board approval if necessary to meet federal time requirements. KRS 338.061 authorizes the

board to establish, modify or repeal standards and reference federal standards. This emergency temporary administrative regulation establishes federal requirements relating to COVID-19 in healthcare settings.

Section 1. Definitions. (1) "Assistant Secretary" means Secretary, Labor Cabinet, or Commissioner, Department of Workplace Standards, Labor Cabinet.

(2) "C.F.R." means Code of Federal Regulations.

(3) "Employee" is defined by KRS 338.015(2).

(4) "Employer" is defined by KRS 338.015(1).

(5) "Occupational Safety and Health Act" or "OSH Act" or OSHA" means KRS Chapter 338.

(6) "Secretary of Labor" means the Secretary of the United States Department of Labor or the Secretary of the Labor Cabinet.

(7) "Section 11(c) of the OSH Act" means KRS 338.121(3).

Section 2. Except as modified by the definitions in Section 1 and the requirements in Section 3 of this emergency administrative regulation, an employer shall comply with 29 C.F.R. Part 1910, Subpart U, COVID-19 Emergency Temporary Standard, published in the June 21, 2021 Federal Register, Volume 86, Number 116.

Section 3. (1)(a) The language in paragraph (b) of this subsection shall apply in lieu of 29 C.F.R. 1910.502(r)(1)(ii).

(b) An employer shall report COVID-19 hospitalizations pursuant to 803 KAR 2:181 or 803 KAR 2:181E, whichever is in effect.

(2)(a) The language in paragraph (b) of this subsection shall apply in lieu of 29 C.F.R. 1910.502(r)(2).

(b) An employer shall follow the requirements established in 803 KAR 2:181 or 803 KAR 2:181E, whichever is in effect, when reporting COVID-19 fatalities and hospitalizations.

JAMIE LINK, Secretary of Labor

APPROVED BY AGENCY:

FILED WITH LRC:

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this emergency administrative regulation shall be held on September 21, 2021 at 10:00 am. (ET). The hearing will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 1, subparagraph (8)(b) (2020) and the continuing state of emergency. Public access to the meeting will be available at

<https://us02web.zoom.us/j/87800440284?pwd=dUZHamFJeTk0TUZpWlQ3UHp5cE9vdz09>, passcode 064833; or by telephone at (713) 353-0212, or (888) 822-7517 toll free, conference code 194378. Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through September 30, 2021. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Robin Maples, OSH Standards Specialist, Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, phone (502) 564-4107, fax (502) 564-4769, email Robin.Maples@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Updated September 17, 2021

Regulation Number: 803 KAR 2:330E

Contact person: Robin Maples (502) 564-4107, Robin.Maples@ky.gov, Facsimile: (502) 564-4769

(1) Provide a brief summary of:

(a) What this administrative regulation does: Section 1 of this emergency administrative regulation defines terms. Section 2 requires employers to comply with the requirements of 29 CFR Part 1910, Subpart U, COVID-19 Emergency Temporary Standard except as modified by the definitions in Section 1 and requirements of Section 3 of this emergency administrative regulation. Section 3 amends the reporting requirement in the June 21, 2021 final rule to comport with the reporting requirement established in 803 KAR 2:181 or 803 KAR 2:181E, whichever is in effect.

(b) The necessity of this administrative regulation: This emergency administrative regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590, 29 CFR 1902.3(c)(1), 29 CFR 1902.3(d)(1), 29 CFR 1902.3(d)(2), 29 CFR 1902.7(a), 29 CFR 1904.37(a), 29 CFR 1904.37(b)(1), 29 CFR 1904.37(b)(2), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1953.5(b), 29 CFR 1956.2(a), and 29 CFR 1956.10(i), which all require the Kentucky OSH Program to be as effective as OSHA. Kentucky must adopt OSHA's ETS within thirty (30) days of the June 21, 2021 final rule and must remain in effect for the duration of OSHA's ETS.

(c) How this administrative regulation conforms to the content of the authorizing statutes:

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This emergency administrative regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590, 29 CFR 1902.3(c)(1), 29 CFR 1902.3(d)(1), 29 CFR 1902.3(d)(2), 29 CFR 1902.7(a), 29 CFR 1904.37(a), 29 CFR 1904.37(b)(1), 29 CFR 1904.37(b)(2), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1953.5(b), 29 CFR 1956.2(a), and 29 CFR 1956.10(i), which all require the Kentucky OSH Program to be as effective as OSHA. This emergency administrative regulation ensures the state is as effective as the federal requirement.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of: Not applicable.

(a) How the amendment will change this existing administrative regulation: Not applicable.

(b) The necessity of the amendment to this administrative regulation: Not applicable.

(c) How the amendment conforms to the content of the authorizing statutes: Not applicable.

(d) How the amendment will assist in the effective administration of the statutes: Not applicable.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This emergency administrative regulation affects employers in the Commonwealth engaged in all activities covered by KRS Chapter 338.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: During the period of the emergency administrative regulation, covered healthcare employers must develop and implement a COVID-19 plan to identify and control COVID-19 hazards in the workplace. Covered employers must also implement other requirements to reduce transmission of COVID-19 in their workplaces, related to patient screening and management, standard and transmission-based precautions; personal protective equipment including facemasks or respirators controls for aerosol-generating procedures, physical distancing of at least six (6) feet when feasible, physical barriers, cleaning and disinfection, ventilation, health screening and medical management, training, anti-retaliation, recordkeeping, and reporting. The standard encourages vaccination by requiring employers to provide reasonable time and paid leave for employee vaccinations and any side effects. It also encourages use of respirators, where respirators are used in lieu of required facemasks, by including a mini respiratory protection program that applies to such use. Finally, the regulation exempts from coverage certain workplaces where all employees are fully vaccinated and individuals with possible COVID-19 are prohibited from entry. And it exempts fully vaccinated employees in well-defined areas where there is no reasonable expectation that individuals with COVID-19 will be present from some of the requirements of the emergency administrative regulation.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): OSHA does not provide a breakdown of the cost for Kentucky entities to comply with the final rule. OSHA estimates the costs of the rule are \$3,969,645,432, the benefits are \$26,851,729,237, with a net benefit of \$22,882,083,805. Section VI.B. of OSHA's June 21, 2021 final rule provides a detailed economic feasibility analysis. There is no additional cost to the OSH Program to implement this emergency administrative regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): The requirement protects healthcare and healthcare support employees in covered healthcare settings from exposures to SARS-CoV-2.

(5) Provide an estimate of how much it will cost to implement this administrative regulation: (a) Initially: There is no cost to the OSH Program to implement this emergency administrative regulation.

(b) On a continuing basis: There are no new costs to the OSH Program associated with this emergency administrative regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current state and federal funding.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new or by the change if it is an amendment: There are no fees associated with this emergency administrative regulation. There is no need to increase funding for this emergency administrative regulation.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: There are no fees associated with this emergency administrative regulation.

(9) TIERING: Is tiering applied? Tiering is not applied. All employers covered by KRS Chapter 338 are treated equally.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate.

Public Law 91-596, the Occupational Safety and Health Act of 1970, Section 18(c)(2), 29 U.S.C. 667

2. State compliance standards. The Kentucky OSH Program is mandated to be at least as effective as OSHA. This emergency administrative regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590, 29 C.F.R. 1902.3(c)(1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.7(a), 29 C.F.R. 1904.37(a), 29 C.F.R. 1904.37(b)(1), 29 C.F.R. 1904.37(b)(2), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(b), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(i). Kentucky must adopt OSHA's ETS within thirty (30) days of the June 21, 2021 final rule and must remain in effect for the duration of OSHA's ETS.

3. Minimum or uniform standards contained in the federal mandate. The Kentucky OSH Program is mandated to be at least as effective as OSHA. This emergency administrative regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590, 29 C.F.R. 1902.3(c)(1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.7(a), 29 C.F.R. 1904.37(a), 29 C.F.R. 1904.37(b)(1), 29 C.F.R. 1904.37(b)(2), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(b), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(i). Kentucky must adopt OSHA's ETS within thirty (30) days of the June 21, 2021 final rule and must remain in effect for the duration of OSHA's ETS.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements: Not applicable.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? This emergency administrative regulation affects any unit, part, or division of local government covered by KRS 338.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 338.061, Public Law 91-596 84 STAT.

1590, 29 C.F.R. 1902.3(c)(1), 29 C.F.R. 1902.3(d)(1), 29 C.F.R. 1902.3(d)(2), 29 C.F.R. 1902.7(a), 29 C.F.R. 1904.37(a), 29 C.F.R. 1904.37(b)(1), 29 C.F.R. 1904.37(b)(2), 29 C.F.R. 1953.1(a), 29 C.F.R. 1953.1(b), 29 C.F.R. 1953.5(b), 29 C.F.R. 1956.2(a), and 29 C.F.R. 1956.10(i),

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect. None.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? None.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None.

(c) How much will it cost to administer this program for the first year? Not determined.

(d) How much will it cost to administer this program for subsequent years? Not determined.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Unknown.

Expenditures (+/-): Unknown.

Other explanation: OSHA does not provide a breakdown of the cost for Kentucky entities to comply with the final rule. OSHA estimates the national costs of the rule are \$3,969,645,432 and the benefits are \$26,851,729,237, with a net benefit of \$22,882,083,805. Section VI.B. of OSHA's June 21, 2021 final rule provides a detailed economic feasibility analysis. There is no additional cost to the OSH Program to implement this emergency administrative regulation.